U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0199

JESUS FLORES	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NATIONAL STEEL AND SHIPBUILDING COMPANY	)	
	)	
	)	DATE ISSUED: 11/20/2020
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order Denying Petition for Section 22 Modification of Susan Hoffman, Administrative Law Judge, United States Department of Labor.

Roy D. Axelrod (Law Office of Roy Axelrod), San Diego, California, for Self-Insured Employer.

William M. Bush and Stefan Babich (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge Susan Hoffman's Order Denying Petition for Section 22 Modification (2016-LHC-01761) rendered on a claim filed pursuant

to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Facts and Procedural History

Claimant injured his back on May 17, 2010, while working for Employer. He underwent surgery on February 2, 2011. Employer paid disability and medical benefits but disputed the nature and extent of Claimant's ongoing disability. Administrative Law Judge Jennifer Gee awarded various types of disability benefits commencing May 18, 2010, ultimately concluding with an ongoing award of permanent partial disability benefits commencing April 16, 2017. Decision and Order Awarding Benefits (Decision and Order) at 21. Because she found Employer had not established Claimant had a pre-existing permanent partial disability (PPPD), she denied Employer's request for Section 8(f), 33 U.S.C. §908(f), relief. Decision and Order at 23.

Employer appealed Judge Gee's decision to the Benefits Review Board in May 2018, but filed a June 2018 motion to dismiss the appeal and remand the case because it had filed a motion for modification on the Section 8(f) issue with the Office of Administrative Law Judges. The Board granted the motion. *Flores v. Nat'l Steel & Shipbuilding Co.*, BRB No. 18-0417 (July 23, 2018). Following Judge Gee's retirement, the matter came before Administrative Law Judge Hoffman. She denied Employer's motion for modification, finding Employer did not establish a mistake in a determination of fact regarding the existence of a PPPD. Order Denying Petition for Section 22 Modification (Order Denying Modification/Modif.) at 26. Employer appeals. The Director, Office of Workers' Compensation Programs (Director), responds, urging affirmance of the denial of Section 8(f) relief, to which Employer filed a reply brief.

Director's Procedural Argument

Although Employer's brief raises challenges to both Judge Gee's and Judge Hoffman's decisions, the Director asserts an appeal of Judge Gee's decision is not properly before the Board. She contends Employer failed to request reinstatement of its first appeal and appealed only Judge Hoffman's Order Denying Modification.

If a party files a motion for modification while an appeal is pending before the Board, the Board must dismiss the case without prejudice. 20 C.F.R. §802.301(c). If the motion for modification is thereafter declined, the moving party may request "reinstatement of his or her appeal with the Board within 30 days" of such denial. *Id.*

Consistent with that provision, in granting Employer's motion to dismiss its appeal of Judge Gee's decision in BRB No. 18-0417, the Board stated:

> This case will be *reinstated by the Board only if petitioner requests reinstatement. The request for reinstatement must be filed with the Board within thirty (30) days from the date the decision on modification is filed, and must be identified by BRB No. 18-0417.* The request for reinstatement must be served on all parties. If reinstatement is requested, the Board will consider only the issues raised in employer's appeal of the Decision and Order [] issued April 26, 2018.
>
> In the event the administrative law judge denies modification and employer wishes the Board to consider not only the original appeal, but also whether the administrative law judge erred in denying modification, *a Notice of Appeal of the Order denying modification must be filed, in addition to the request for reinstatement.* * * * The appeal of the Order on modification will be assigned a new docket number and will be consolidated with the appeal of the original decision, BRB No. 18-0417.

Flores Order at 1-2 (emphasis added).

Employer's timely Notice of Appeal, which addressed only Judge Hoffman's decision, states in pertinent part:

> [Employer] hereby appeals the Decision and Order on Modification of Administrative Law Judge Susan Hoffman filed by OWCP District Director Marco Adame of the 18th Compensation District on February 7, 2020.
> ***
> 5) The Decision and Order of Administrative Law Susan Hoffman was filed and served on the parties by the OWCP on February 7, 2020;
> 6) Neither party has filed a petition for reconsideration of the Decision and Order of Judge Susan Hoffman.

Employer first requested reinstatement of its appeal of Judge Gee's decision in its appellate brief in BRB No. 20-0199, filed on May 18, 2020. Emp. Br. at 2. We must deny Employer's request as untimely because the request for reinstatement was due by March 9, 2020 (30 days from February 7, 2020, was Sunday, March 8, 2020; 20 C.F.R. §802.221(a)), in accordance with the regulation and the Board's Order. *Flores* Order at 1-2; 20 C.F.R. §802.301(c).

As Employer did not timely request reinstatement of its appeal of Judge Gee's decision denying Section 8(f) relief, the Director correctly asserts the only decision currently on appeal to the Board is Judge Hoffman's Order Denying Modification. While Employer asserts the distinction is "of no moment" because both decisions contain the same errors, we must nevertheless limit our consideration to Employer's appeal of Judge Hoffman's decision. Reply Br. at 4. We summarize Judge Gee's findings, however, in order to review Employer's contentions regarding Judge Hoffman's Order Denying Modification.

Section 8(f) and Judge Gee's Decision

Section 8(f), 33 U.S.C. §908(f), shifts liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44, 33 U.S.C. §944. An employer may be granted Special Fund relief in a case where a claimant is permanently partially disabled if it establishes the claimant had a manifest PPPD, the permanent partial disability following the subsequent work injury is not due solely to that work injury, and the permanent partial disability is materially and substantially greater than would have resulted from the subsequent injury alone. 33 U.S.C. §908(f) (1); *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85(CRT) (9th Cir. 1991). A condition need not be economically disabling to constitute a PPPD under Section 8(f) but must be "such a serious physical disability . . . that a cautious employer would [be] motivated to discharge the . . . employee because of a greatly increased risk of . . . compensation liability." *Lockheed Shipbuilding*, 951 F.2d at 1145, 25 BRBS at 88(CRT) (quoting *C & P Tel. Co. v. Director, OWCP*, 564 F.2d 503, 513, 6 BRBS 399, 415 (D.C. Cir. 1977)); *Todd Pacific Shipyards Corp. v. Director, OWCP [Mayes]*, 913 F.2d 1426, 24 BRBS 25(CRT) (9th Cir. 1990). Further, the mere fact of a past injury does not establish a PPPD unless, as a result of that injury, there exists some serious, lasting physical problem. *Director, OWCP v. Belcher Erectors*, 770 F.2d 1220, 17 BRBS 146(CRT) (D.C. Cir. 1985); *Director, OWCP v. Campbell Indus., Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982).

Employer asserted Claimant had pre-existing degenerative disc disease and retrolisthesis, focusing on six pre-injury medical reports dated between 1995 and January 2010 when Claimant sought treatment for back pain. Judge Gee addressed these reports and found there was no diagnosis of degenerative disc disease in them, and the 1995 x-ray indicated only that Claimant's disc space narrowing was "probably degenerative." Decision and Order at 22; EX FF. She found Employer provided "no medical framework" about Claimant's retrolisthesis due to the deficiency of evidence about that condition. *Id.* While she acknowledged a definitive diagnosis of a PPPD is not required for Section 8(f) purposes, she concluded the prior incidents of back pain were independent, temporary, and resolved after conservative treatment, and as such are not indicative of a "serious, lasting"

condition. *Id*. at 23; *see C & P Telephone*, 564 F.2d 503, 6 BRBS 399. Therefore, Judge Gee found Employer failed to prove Claimant had a PPPD necessary for Section 8(f) relief. Decision and Order at 23.

Section 22 and Judge Hoffman's Decision

Section 22 of the Act provides the only means for re-opening a claim that has been finally adjudicated; it allows for modification of a prior decision if there has been a change in condition or a mistake in the determination of fact. 33 U.S.C. §922; *see Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968); *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993) (mixed question of law and fact is a proper subject of a Section 22 request); *G.K. [Kunihiro] v. Matson Terminals, Inc.*, 42 BRBS 15 (2008), *aff'd sub nom. Director, OWCP v. Matson Terminals, Inc.*, 442 F. App'x 304 (9th Cir. 2011) (Section 8(f) findings are subject to modification). The party moving for modification, in this case Employer, has the burden of establishing the prior decision should be modified. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003). Under Section 22, the administrative law judge has broad discretion to correct mistakes of fact whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *see Banks*, 390 U.S. 459. Further, a basic criterion for re-opening a case under Section 22 is whether it will "render justice under the Act." *O'Keeffe*, 404 U.S. at 255; *Banks*, 390 U.S. 459; *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 547, 36 BRBS 35, 44-45(CRT) (7th Cir. 2002).

Following Judge Gee's denial of Section 8(f) relief, Employer requested a supplemental opinion from Dr. Larry Dodge. On May 23, 2018, in responding to Employer's letter dated earlier that day, Dr. Dodge reviewed Claimant's 1995 x-ray report[1] and concluded: "Medically, this gentleman clearly had degenerative disc disease at L4-L5 and L5-S1" and Claimant "had some narrowing at L4-L5 and L5-S1 disc spaces [which] is pathognomonic for disc degeneration." Dodge Rep. at 2. He explained the "retrolisthesis of L5" is more important than the disc degeneration because it is "an abnormal shift of the L5 vertebrae" and "is indicative of 'instability.'" *Id.* Based on the 1995 x-ray report, he

[1] On October 3, 1995, Dr. Charles Lee, a radiologist, reported his findings of Claimant's "Limited Lumbar Spine" x-ray (taken October 2, 1995): "There is a slight narrowing of the L4-5 and L5-S1 disc spaces. There is a retrolisthesis L5. The vertebral bodies are intact. IMPRESSION: MINIMAL DISC SPACE NARROWING PROBABLY DEGENERATIVE; OTHERWISE INTACT LUMBAR SPINE." EX FF.

stated "with absolute medical certainty that [Claimant] had disc space collapse, and instability prior to his employment at NASSCO and prior to the injury of May 17, 2010." *Id.* Had he examined Claimant in 1995, Dr. Dodge surmised he would have informed Employer of Claimant's "increased risk of a back injury as a result of this objective abnormality in his spine." *Id.* He stated with "absolute certainty" that the injury was materially and substantially greater due to "the pre-existent degenerative disc disease and radiographic evidence of spinal instability." *Id.* at 2-3. In support of his opinion, he cited Claimant's 2001, 2003, 2004, and January 2010 back injuries, stating "[Claimant's] back pain at that time, without question, was certainly attributable to his pre-existent disc degeneration and pre-existent spinal instability as a result of his retrolisthesis." *Id.* at 3.

Judge Hoffman reviewed the medical evidence Judge Gee previously had considered, Dr. Dodge's deposition testimony, and the post-decision evidence Employer submitted with its motion for modification, consisting of Dr. Dodge's 2018 report. Order Denying Modif. at 7-15. With respect to the pre-injury medical reports, she determined "[n]one of these medical care providers, at any time over the ten year period during which Claimant experienced these four discrete episodes of back pain, appears to have suggested that Claimant's symptoms were caused by anything other than what was noted in their records." *Id.* at 12.[2] Noting Judge Gee did not discuss Dr. Dodge's 2017 deposition in detail, Judge Hoffman specifically "read and considered" it because "it provides some insight" into his thoughts during the time between when he wrote his previous medical reports, which Judge Gee considered, and when he wrote his 2018 report, which post-dated her decision. Judge Hoffman found Dr. Dodge was equivocal as to whether Claimant's pre-existing condition was arthritis or disc degeneration, he did not describe the impact of the pre-existing condition, and "[h]is opinions on the particular elements of Section 8(f) relief were conclusory and unexplained." *Id.* at 10. She found Dr. Dodge's 2018 report to be conclusory, a change from his prior opinions, and an attempt to satisfy Employer's Section 8(f) requirements by exaggerating the prior medical findings. She gave it "virtually no weight." *Id.* at 10-14.

Judge Hoffman then weighed the factors for determining whether modification would render justice under the Act and concluded they establish that granting modification would not render justice under the Act.[3] Order Denying Modif. at 16-20; *see Old Ben*, 292

[2] The medical records pre-dating Claimant's May 2010 work injury reported Claimant's prior strains were treated conservatively and were temporary in duration. EX D at 39, 106; EX S at 254-258; EX GG at 438.

[3] She weighed finality, diligence, futility, and the quality of evidence against modification; accuracy in favor of modification; and sanctionable conduct, motive, and the number of motions filed as neutral. Judge Hoffman also noted the United States Court of

F.3d 533, 36 BRBS 35(CRT) (accuracy may outweigh finality, but re-opening the case must render justice under the Act); *R.V. [Vina] v. Friede Goldman Halter*, 43 BRBS 22 (2009). Therefore, she denied Employer's motion.[4] Order Denying Modif. at 25.

Employer's Appeal

Employer contends Claimant had pre-existing degenerative disc disease, retrolisthesis, and chronic back pain, and Judge Hoffman erred in failing to find any one of these constitutes a PPPD and in denying Section 8(f) relief. Employer asserts Judge Hoffman did not consider the relevant evidence as a whole and erred in rejecting Dr. Dodge's opinion. The Director responds, asserting Employer has failed to establish error in Judge Hoffman's decision denying modification.

Discussion

We first reject Employer's assertion that Judge Hoffman ignored Dr. Dodge's deposition and other evidence. After addressing the 1995 x-ray report and the medical treatment notes from November 2001, April 2003, November 2004, March 2009, and January 2010, all of which Judge Gee considered and which generally indicated pre-injury strains and conservative treatment, Judge Hoffman summarized and discussed Dr. Dodge's deposition. Order Denying Modif. at 9-10. In his 2017 deposition, Dr. Dodge explained he first saw Claimant on May 26, 2010, diagnosed a lumbar strain, and noted back spasm related to degenerative disc disease. EX HH at 446-448. He saw Claimant multiple times in 2010, once in 2011 as a "qualified medical examiner," once in 2014 as a "defense expert," and again in 2015 and 2016. *Id.* at 453-455; EX D.

Dr. Dodge described his understanding of Section 8(f) as providing an employer relief when an individual has "some preexistent disease" and his "disability would be higher because of that preexisting condition combined with the work injury." EX HH at 457. He believed Claimant had pre-existing degenerative disc disease or arthritis because his May 2010 x-rays and July 2010 MRI showed early degenerative disc disease which

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Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has not addressed these factors directly. Order Denying Modif. at 16-25.

[4] Judge Hoffman's analysis of whether granting modification would render "justice under the Act" was unnecessary in light of her finding that Employer did not establish a mistake in a determination of fact in Judge Gee's opinion and is not entitled to modification on the merits. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968).

would have developed before his work injury. *Id.* at 457-459. Based on the prior treatment records for back pain, Dr. Dodge stated Claimant had pre-injury symptomatic disc disease and would meet all the requirements for Section 8(f) relief. *Id.* at 459-460.

In assessing Dr. Dodge's deposition, Judge Hoffman acknowledged Judge Gee may have referenced his deposition when noting "Dr. Dodge did not discuss retrolisthesis[.]" Order Denying Modif. at 10 (quoting Decision and Order at 22). For her part, Judge Hoffman described Dr. Dodge as "at one point, equivocal in his opinion as to Claimant's back condition, which he said was either arthritis or disc degeneration." Order Denying Modif. at 10. Moreover, she stated he did not "identify or describe the impact such degeneration had on Claimant prior to his industrial injury" and his Section 8(f) opinion was "conclusory and unexplained." *Id.*

Employer alleges the administrative law judge "ignored" Dr. Dodge's 2011 and 2016 reports,[5] which Employer asserts support his 2018 supplemental opinion. Employer's Brief at 20. Contrary to Employer's argument, the administrative law judge's decision reflects that she considered all his reports. Her explicit statement that she "reviewed in detail the evidence in the record as well as the newly-proffered evidence," extensive discussion of Dr. Dodge's 2010 and 2018 reports and deposition testimony, notation that he found Claimant's condition permanent and stationary in January 2016, and references to Dr. Dodge as an "IME" (2011 report) and "defense expert" (2014 report) indicate she did so. Order Denying Modif. at 6-10, 24; *see Global Linguist Solutions, L.L.C. v. Abdelmeged*, 913 F.3d 921, 52 BRBS 53(CRT) (9th Cir. 2019); *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000); EX HH at 453. Any potential error in not addressing each medical report in greater detail is harmless. *See Abdelmeged*, 913 F.3d 921, 52 BRBS 53(CRT); *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Moore v. Director, OWCP*, 835 F.2d 1219, 20 BRBS 68(CRT) (7th Cir. 1987).

We also reject Employer's contention that Judge Hoffman erred in finding Dr. Dodge's 2018 supplemental opinion not credible. The fact-finder has the authority and discretion to weigh, credit, and draw her own inferences from the evidence of record; she is not bound to accept the opinion or theory of any particular expert. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). Judge Hoffman gave no weight to Dr. Dodge's 2018 report because she found "it is not objective or contemporaneous" and is a "late-breaking conclusory opinion" "more focused on

[5] In these reports, Dr. Dodge apportioned Claimant's disability between his pre-existing conditions and his work injury. EX D at 46-47, 103-115.

reaching conclusions which would be beneficial to the Employer" than explaining his findings. Order Denying Modif. at 12, 14, 24. She stated, in view of Dr. Dodge's busy schedule, that his "willingness and ability to pen [the 2018] report" the same day he received Employer's inquiry "undermines my confidence in the credibility of any of [his] pre-decision opinions." *Id.* at 24. She found his opinions were more "solid" and reliable when they were provided contemporaneously with his evaluation and treatment of Claimant, but became much less so when he became Employer's "defense expert," stating: "Th[e] stridency of this eleventh-hour opinion sits uncomfortably against the sparse and far less definitive contemporary appraisals of the Claimant's previous episodes of back pain." *Id.* She was unpersuaded by Dr. Dodge's characterization of his opinion as stated with "absolute medical certainty" and his "sweeping and general conclusions" made in 2018 based on a "newly-produced five-line report" of an x-ray taken in 1995.[6] *Id.* at 11-14. She also found he did not credibly explain why he changed his opinion in his 2018 supplemental report, noting that, in a May 2010 report written contemporaneously with Claimant's injury, Dr. Dodge concluded the cause of Claimant's condition was his work-related accident, despite evidence of some degenerative disc disease.[7] *Id.* at 13-14; EX D at 8.

The seminal issue in this case is whether Employer established Claimant had a PPPD prior to his 2010 work injury. Employer must show not merely that Claimant had a pre-existing condition or previous medical problems but that he had a serious and lasting problem. *Campbell Indus.*, 678 F.2d 836, 14 BRBS 974. Judge Hoffman found Employer did not establish Claimant had such a "serious and lasting" pre-injury condition:

> Degenerative 'changes' to Claimant's spine were likely developing over time, but the record contains no objective information on which to base a determination that Claimant suffered from degenerative disc disease of a serious and lasting nature at any point prior to the date of injury. I am invited

[6] While the 1995 x-ray report was not "new," it appears Dr. Dodge first saw it in 2018. Dodge Rep. at 1.

[7] In his 2011 and 2016 reports, Dr. Dodge attributed, with what he characterized as "reasonable medical certainty," the cause of Claimant's condition to his work injury and his pre-existing arthritic/degenerative condition. EX D at 46-47 (apportioning 25% to non-work variables), 103-115 (apportioning 15% to the pre-existing condition). Dr. Dodge's 2018 report concluded the same but with "absolute medical certainty." Dodge Rep. at 2. In 2010, 2014 and 2015, however, Dr. Dodge opined "within reasonable medical probability" only that Claimant's condition was "causally related to the industrial injury in question." EX D at 8, 60, 86, 99.

> to infer, as did Dr. Dodge, from the subsequent radiographic information that Claimant's disc disease had to have been in existence prior to the date of injury. But the record is absent of objective evidence to support this conclusion, or the more particular conclusion that Claimant had degenerative disc disease of a serious and lasting nature before the date of injury.

Order Denying Modif. at 12. Substantial evidence supports Judge Hoffman's conclusion.

Dr. Dodge based his 2018 opinion on his review of the medical record. He relied on Dr. Lee's 1995 x-ray report, n.1, *supra*, but, as Judge Hoffman stated, "[t]he difference between the conclusions of Dr. Lee and Dr. Dodge is startling – from 'minimal disc space narrowing' to 'disc space collapse' [and] from 'probable' [degenerative changes] to 'absolute medical certainty.'" Order Denying Modif. at 11. Similarly, with respect to the other pre-injury medical reports, Judge Hoffman concluded:

> Dr. Dodge refers to four instances in the medical record where Claimant's experience of back pain is noted. Dr. Dodge, 'without question,' attributes these episodes of back pain to Claimant's pre-existing disc degeneration and instability. Strangely, however, the treating providers make absolutely no mention of those conditions, nor do they prescribe any but the most conservative treatment, nor do they identify the episodes of pain as symptomatic of some serious and lasting condition.

Id.; *see* EXs D, S, FF, GG.

Contrary to Employer's arguments, the Board may not reweigh the evidence, but may inquire only into the existence of substantial evidence to support the findings. *Gindo v. Aecon Nat'l Sec. Programs, Inc.*, 52 BRBS 51 (2018); *see also Sea-Land Services, Inc., v. Director, OWCP [Ceasar]*, 949 F.3d 921, 54 BRBS 9(CRT) (5th Cir. 2020); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988). Judge Hoffman rationally found the evidence Dr. Dodge relied on does not establish Claimant had a PPPD because he overstated Dr. Lee's 1995 x-ray findings, and the treatment records indicating Claimant recovered from temporary back pain without complications show he did not have a serious, lasting, physical condition prior to his 2010 work injury.[8] *See generally Director,*

[8] Employer's reliance on four Board cases involving back injuries does not establish the PPPD standard is met here. The holdings in those cases are fact-specific and do not mandate that prior back injuries always constitute a PPPD. *Currie v. Cooper Stevedoring Co.*, 23 BRBS 420 (1990) (physicians considered degenerative disease in hip a serious condition and would have advised the employer to not hire him); *Dugas v. Durwood Dunn, Inc.*, 21 BRBS 277 (1988) (physicians acknowledged pre-existing hepatitis plus evidence

OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines], 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998). She also permissibly found Dr. Dodge's lack of consistency in reporting on the cause of Claimant's condition, as compared to his latest opinion purporting to identify the cause with "absolute medical certainty," undermines his credibility. *See Cordero v. Triple A Mach. Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979) (credibility determinations cannot be overturned unless they are "inherently incredible or patently unreasonable"). Therefore, we affirm the denial of Employer's motion for modification on its claim for Section 8(f) relief.

Accordingly, we affirm the Order Denying Petition for Section 22 Modification.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

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it may have become symptomatic due to medications for work-related neck injury); *Gibbs v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 954 (1982) (physicians diagnosed the claimant had arthritis prior to his work injury); *Lowry v. Willamette Iron & Steel Co.*, 11 BRBS 372 (1979) (issue was whether PPPD of degenerative disc disease was manifest to the employer).